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APPLE INC.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

ZOMM, LLC,

**Plaintiff.**

Case No. 4:18-cv-04969-HSG

v.

APPLE INC.

**Defendant.**

**STIPULATION & ORDER RE:  
DISCOVERY OF ELECTRONICALLY  
STORED INFORMATION**

Judge: Haywood S. Gilliam, Jr.

1 Plaintiff Zomm, LLC and Defendant Apple Inc. (collectively, the “Parties”) hereby agree,  
2 subject to approval by the Court, that the following procedures shall govern discovery of  
3 Electronically-Stored Information (“ESI”) in this case:

4 1. This Order supplements all other discovery rules and orders. It streamlines ESI  
5 production to promote a “just, speedy, and inexpensive determination of this action, as required  
6 by Federal Rule of Civil Procedure 1.”

7 2. This Order may be modified in the Court’s discretion or by stipulation. The Parties  
8 shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil  
9 Procedure 16 Conference.

10 3. As in all cases, costs may be shifted for disproportionate ESI production requests  
11 pursuant to Federal Rule of Civil Procedure 26. Likewise, a Party’s nonresponsive or dilatory  
12 discovery tactics are cost-shifting considerations. A Party’s meaningful compliance with this  
13 Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting  
14 determinations.

15 4. The Parties are expected to comply with the District’s E-Discovery Guidelines  
16 (“Guidelines”) and are encouraged to employ the District’s Model Stipulated Order Re: the  
17 Discovery of Electronically Stored Information and Checklist for Rule 26(f) Meet and Confer  
18 regarding Electronically Stored Information. The parties have discussed their preservation  
19 obligations and needs and agree that preservation of potentially relevant ESI will be reasonable  
20 and proportionate. To reduce the costs and burdens of preservation and to ensure proper ESI is  
21 preserved, the parties agree that:

22 a. Only ESI created or received after January 1, 2009 through the filing date of this  
23 Action will be preserved if it existed in a party’s possession, custody or control as  
24 of April 23, 2018;

25 b. The parties will exchange a list of the types of ESI they believe should be  
26 preserved and the names or general job titles or descriptions of custodians, for  
27 whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and

1           “marketing manager.” The parties shall add or remove custodians as reasonably  
2           necessary;

- 3           c. The parties will agree on the number of custodians per party for whom ESI will be  
4           preserved;  
5           d. The parties agree to discuss data sources that may contain ESI that may not be  
6           reasonably accessible because of undue burden or cost pursuant to Fed. R. Civ. P.  
7           26(b)(2)(B).

8           5. With respect to Plaintiff’s patent claim, general ESI production requests under  
9           Federal Rules of Civil Procedure 34 and 45 shall not include email or other forms of electronic  
10          correspondence (collectively “email”). To obtain email related to the patent claim, Parties must  
11          propound specific email production requests.

- 12           a. Email production requests shall only be propounded for specific issues, rather than  
13           general discovery of a product or business.  
14           b. Email production requests shall be phased to occur after the Parties have  
15           exchanged initial disclosures and basic documentation about the patents, the prior  
16           art, the accused instrumentalities, and the relevant finances. While this provision  
17           does not require the production of such information, the Court encourages prompt  
18           and early production of this information to promote efficient and economical  
19           streamlining of the case.  
20           c. Email production requests shall identify the custodian, search terms, and time  
21           frame. The Parties shall cooperate to identify the proper custodians, proper search  
22           terms and proper timeframe as set forth in the Guidelines.  
23           d. The foregoing limitations shall not apply to discovery requests related to Plaintiff’s  
24           non-patent claims.

25           6. For all such requests, each requesting Party shall limit its email production  
26          requests to: (1) a total of five custodians per producing Party if Plaintiff’s non-patent claims are  
27          dismissed and Plaintiff’s patent claim is not stayed; (2) a total of ten custodians per producing  
28          Party if Plaintiff’s non-patent claims are not dismissed and Plaintiff’s patent claim is stayed; or

1 (3) a total of fifteen custodians per producing Party if Plaintiff's non-patent claims are not  
2 dismissed and Plaintiff's patent claim is not stayed. The Parties may jointly agree to modify this  
3 limit without the Court's leave. The Court shall consider contested requests for additional  
4 custodians, upon showing a distinct need based on the size, complexity, and issues of this specific  
5 case. Cost-shifting may be considered as part of any such request.

6       7.     Each requesting Party shall limit its email production requests to: (1) a total of five  
7 search terms per custodian per Party if Plaintiff's non-patent claims are dismissed and Plaintiff's  
8 patent claim is not stayed; (2) a total of ten search terms per custodian per Party if Plaintiff's non-  
9 patent claims are not dismissed and Plaintiff's patent claim is stayed; or (3) a total of fifteen  
10 search terms per custodian per Party if Plaintiff's non-patent claims are not dismissed and  
11 Plaintiff's patent claim is not stayed. The Parties may jointly agree to modify this limit without  
12 the Court's leave. The Court shall consider contested requests for additional search terms per  
13 custodian, upon showing a distinct need based on the size, complexity, and issues of this specific  
14 case. The Court encourages the Parties to confer on a process to test the efficacy of the search  
15 terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such  
16 as the producing company's name or its product name, are inappropriate unless combined with  
17 narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive  
18 combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and  
19 shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*,  
20 "computer" or "system") broadens the search, and thus each word or phrase shall count as a  
21 separate search term unless they are variants of the same word. Use of narrowing search criteria  
22 (*e.g.*, "and," "but not," "w/x") is encouraged to limit the production and shall be considered when  
23 determining whether to shift costs for disproportionate discovery. Notwithstanding prior  
24 agreement on the search terms to be used for searches, should a search for emails produce an  
25 unreasonably large number of non-responsive or irrelevant results, the Parties shall (at the  
26 producing party's request) meet and confer to discuss application of further negative search  
27 restrictions (*e.g.*, if a single search was for "card" and ninety percent of the resulting emails came  
28 from the irrelevant term "credit card," a negative limitation to ignore emails only returned as a

result of “credit card” may be applied to remove these emails). The Party receiving production shall not unreasonably oppose such further restrictions designed to filter immaterial email search results. Should a Party serve email production requests with search terms beyond the limits agreed to by the Parties or granted by the Court pursuant to this paragraph, this shall be considered in determining whether any Party shall bear all reasonable costs caused by such additional discovery.

Nothing in this Order prevents the Parties from agreeing to use technology assisted review and other techniques insofar as their use improves the efficacy of discovery. Such topics should be discussed pursuant to the District’s E-Discovery Guidelines.

**9. Documents Protected from Discovery.** Communications involving outside and/or in-house counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

**10. Format for production of documents – documents existing in electronic format.** Except as otherwise provided for in this Stipulation, all documents existing in electronic format shall be produced in multiple page, searchable PDF format at a resolution of at least 300 dpi in accordance with the following:

- a. PDF files shall be produced along with Concordance/Opticon image load files that indicate the beginning and ending of each document.
- b. For documents that already exist in PDF format prior to production (i.e., which the producing party receives from a client or third party in PDF format), the producing party may provide them in that same PDF format, whether searchable or non-searchable. For documents converted to PDF format prior to production, the producing party shall make reasonable efforts to convert to searchable PDF.
- c. **Metadata.** Load files should include, where applicable, the information listed in the Table of Metadata Fields, attached as Exhibit A. However, the Parties are not obligated to include metadata for any document that does not contain such metadata in the original, if it is not possible to automate the creation of metadata

1                   when the document is collected. The Parties reserve their rights to object to any  
2                   request for the creation of metadata for documents that do not contain metadata in  
3                   the original.

4                  d. **Production media and encryption of productions.** Unless otherwise agreed, the  
5                   Parties shall provide document productions in the following manner: The  
6                   producing party shall provide the production data on CDs, DVDs, external hard  
7                   drives or SFTP, as appropriate. The producing party shall encrypt the production  
8                   data using WinRAR encryption, and the producing party shall forward the  
9                   password to decrypt the production data separately from the CD, DVD, external  
10                  drive or SFTP to which the production data is saved.

11                 11. **Format for production of documents – hardcopy or paper documents.** All  
12                 documents that are hardcopy or paper files shall be scanned and produced in the same manner as  
13                 documents existing in electronic format, above.

14                 12. **Source code.** This Stipulation does not govern the format for production of source  
15                 code, which shall be produced pursuant to the relevant provision of the Protective Order.

16                 13. **Parent and child emails.** The Parties shall produce email attachments  
17                 sequentially after the parent email.

18                 14. **Native files.** The Parties will meet and confer to discuss requests for the  
19                 production of files in native format, on a case-by-case basis. If the Parties are unable to reach  
20                 agreement with regard to requests for additional documents in native-file format, the Parties  
21                 reserve the right to seek relief from the Court. Documents produced natively shall be represented  
22                 in the set of imaged documents by a slipsheet indicating the production identification number and  
23                 confidentiality designation for the native file that is being produced.

24                 15. **Databases.** Certain types of databases are dynamic in nature and will often  
25                 contain information that is neither relevant nor reasonably calculated to lead to the discovery of  
26                 admissible evidence. Thus, a Party may opt to produce relevant and responsive information from  
27                 databases in an alternate form, such as a report or data table. These reports or data tables will be  
28                 produced in a static format.

1       The Parties agree to identify the specific databases, by name, that contain the relevant and  
2 responsive information that Parties produce.

3       **16. Requests for hi-resolution or color documents.** The Parties agree to respond to  
4 reasonable and specific requests for the production of higher resolution or color images. Nothing  
5 in this Stipulation shall preclude a producing party from objecting to such requests as  
6 unreasonable in number, timing or scope, provided that a producing party shall not object if the  
7 document as originally produced is illegible or difficult to read. The producing party shall have  
8 the option of responding by producing a native-file version of the document. If a dispute arises  
9 with regard to requests for higher resolution or color images, the Parties will meet and confer in  
10 good faith to try to resolve it.

11       **17. Foreign language documents.** All documents shall be produced in their original  
12 language. Where a requested document exists in a foreign language and the producing party also  
13 has an English-language version of that document that it prepared for non-litigation purposes  
14 prior to filing of the lawsuit, the producing party shall produce both the original document and all  
15 English-language versions. In addition, if the producing party has a certified translation of a  
16 foreign-language document that is being produced, (whether or not the translation is prepared for  
17 purposes of litigation) the producing party shall produce both the original document and the  
18 certified translation. Nothing in this agreement shall require a producing party to prepare a  
19 translation, certified or otherwise, for foreign language documents that are produced in discovery.

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## **IT IS SO STIPULATED.**

Dated: January 18, 2019

KELLEY DRYE AND WARREN LLP

By: /s/ Michael J. Zinna  
Michael J. Zinna  
Attorneys for Plaintiff  
ZOMM, LLC

Dated: January 18, 2019

## O'MELVENY & MYERS LLP

By: /s/ Luann L. Simmons  
Luann L. Simmons  
Attorneys for Defendant  
APPLE INC.

**CERTIFICATE OF SERVICE**

I certify that all counsel of record is being served on January 18, 2019, with a copy of this document via the Court's CM/ECF system.

/s/ *Luann L. Simmons*

Luann L. Simmons

## FILER'S ATTESTATION

Pursuant to Local Rule 5-1(i)(3), I hereby attest that the other signatory listed, on whose behalf the filing is submitted, concurs in the filing's content and has authorized the filing.

/s/ *Luann L. Simmons*

Luanne L. Simmons

## ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: January 22, 2019

  
Haywood S. Gilliam, Jr.  
United States District Court Judge

**EXHIBIT A**

## **TABLE OF METADATA FIELDS**

<u>Field Name</u>	<u>Specifications Field Name</u>	<u>Field Type</u>	<u>Description (Email)</u>	<u>Description (E- Files/Attachments)</u>
BegDoc	Unique ID (Bates number)	Paragraph	The Document ID number associated with the first page of an email.	The Document ID number associated with the first page of a document
EndDoc	Unique ID (Bates number)	Paragraph	The Document ID number associated with the last page of an email.	The Document ID number associated with the last page of a document.
BegAttach	Unique ID (Bates number) Parent-Child Relationships	Paragraph	The Document ID number associated with the first page of a parent email.	The Document ID number associated with the first page of a parent document.
EndAttach	Unique ID (Bates number) Parent-Child Relationship	Paragraph	The Document ID number associated with the last page of the last attachment to a parent email.	The Document ID number associated with the last page of the last attachment to a parent document.
Pages	Pages	Number	The number of pages for an email.	The number of pages for a document.
DateSent		Date (MM/DD/YYYY format)	The date the email was sent.	For email attachments, the date the parent email was sent.
Author	Author Display Name (e-mail)	Paragraph	The display name of the author or sender of an email.	The name of the author as identified by the metadata of the document.
To	Recipient	Paragraph	The display name of the recipient(s) of an email.	The display name of the recipient(s) of a document (e.g., fax recipients).

<u>Field Name</u>	<u>Specifications Field Name</u>	<u>Field Type</u>	<u>Description (Email)</u>	<u>Description (E- Files/Attachments)</u>
CC	CC	Paragraph	The display name of the copyee(s) of an email.	
BCC	BCC	Paragraph	The display name of the blind copyee(s) of an email.	
Subject	Subject (e-mail)	Paragraph	The subject line of an email.	The subject of a document from entered metadata.
Custodian	Custodian	Paragraph	The custodian of an email.	The custodian of a document.